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No. 02-1343

IN THE

Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, JOINED BY THE STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS, AND ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), preempts state and local clean air regulations that enhance the market for cleaner fleet vehicles, such as urban transit buses, without imposing any production mandates or other obligations on manufacturers.

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INTEREST OF THE *AMICI CURIAE*

Amici National League of Cities, National Conference of State Legislatures, National Association of Counties, Council of State Governments, International City/County Management Association, U.S. Conference of Mayors, and International Municipal Lawyers Association are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials are national associations representing air pollution control agencies in 53 States and territories and more than 165 major metropolitan areas across the United States. *Amici* have a compelling interest in preserving the longstanding power of state and local governments to protect public health and the environment.

Amici's members currently face the enormous task of complying with new federal air quality standards for soot and ozone issued by the U.S. Environmental Protection Agency in 1997. It is vital that these officials retain the flexibility envisioned by Congress to adopt and implement creative controls on significant sources of air pollution such as motor vehicles. Invalidation of innovative programs such as respondent South Coast Air Quality Management District's ("South Coast's") Fleet Rules would adversely affect state and local economies by unfairly shifting more of the compliance burden on small businesses and other stationary sources of pollution.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of blanket consent with the Clerk.

Amici's members include local governments that are part of the regulated community subject to the Fleet Rules. These municipalities might well become subject to additional controls on vehicle purchases imposed by state and regional authorities. *Amici* recognize, however, that fleet purchase requirements and similar rules often create economies of scale that benefit the citizenry of the regulated jurisdictions. As members of the regulated community, *amici* fully support respondents' position.

The Clean Air Act promotes cooperative federalism by making state and local governments hands-on partners with the federal government. *See* 42 U.S.C. § 7401(a)(3) (state and local governments have "primary responsibility" for improving air quality); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470 (2001) ("It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources."). Notwithstanding petitioners' suggestion to the contrary (Br. 2), the Act's cooperative federalism extends to mobile sources, with States expressly encouraged to adopt innovative programs to reduce mobile source pollution. *E.g.*, 42 U.S.C. § 7408(f) (requiring EPA to assist the States in adopting a lengthy list of mobile source controls). Even prior to the passage of the Act, many state and local governments, particularly California, were already regulating mobile sources of air pollution to protect public health and the environment.

To be sure, section 209 of the Act strikes a compromise between the interests of States and automakers by preventing the States from requiring manufacturers to build 50 different kinds of cars to comply with 50 sets of emission standards. But section 209 should be interpreted in a way that preserves the authority of state and local governments to impose controls on vehicle purchasers designed to reduce motor vehicle emissions. The Court's well-settled presumption

against preemption, as well as its concomitant narrow interpretation of express preemption provisions, promotes "federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. The text of section 209 and the Clean Air Act as a whole shows that the Fleet Rules are not "standards" preempted by section 209(a). The repeated references to "standards and other requirements" in other portions of section 209 make clear that the term "standard" in section 209(a) does not embrace any "requirement" related to the control of emissions from new motor vehicles as argued by petitioners. Rather, the use of "standard" in related provisions shows that the term is limited to numerical specifications for vehicle emissions imposed on manufacturers. Indeed, the one provision of the Act that expressly addresses fleet purchase requirements, section 246, refers to these rules not as "standards," but as "requirements."

In keeping with the text, structure, and history of section 209(a) and the Act, the U.S. Environmental Protection Agency has long interpreted the term "standard" to refer exclusively to numerical emission limits imposed on manufacturers. *E.g.*, 66 Fed. Reg. 57,223, 57,225 (Nov. 14, 2001). EPA has statutory authority to define the term "standard" as used in section 209 and Title II generally, but never in the 36-year history of section 209 has EPA or any court applied the term "standard" to rules that impose obligations on vehicle purchasers rather than manufacturers.

The distinction relied on by the courts below between standards imposed on manufacturers and requirements imposed on purchasers adheres to the text, structure, and history of the Act. It also makes good sense from an economic policy perspective. Purchase requirements generally are less burdensome on manufacturers than emission standards and often benefit the regulated community by creating economies of scale and lower overall costs for purchasers that would not otherwise exist.

2. Petitioners read section 209 as invalidating any state or local law that refers in any way to numerical emission standards or vehicle design criteria related to emissions, even where the law imposes no requirements on manufacturers. This reading would undermine the cooperative federalism that underlies protections for public health and the environment by invalidating many state and local laws designed to improve air quality.

Petitioners' unduly broad reading of section 209 also would have substantial economic consequences for state and local governments. EPA's new air quality standards for smog and soot will impose enormous compliance costs. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). As state and local officials endeavor to find ways to meet these new standards, petitioners' broad reading of section 209(a) would improperly tie their hands, preventing them from adopting creative demand-side programs designed to reduce motor vehicle emissions. Petitioners' hair-trigger preemption test would foist an unfair portion of the compliance burden on small businesses and other stationary sources, render this Court's presumption against preemption a hollow promise, and undermine Congress's stated intent that air quality officials have the flexibility necessary to meet the Act's requirements in a balanced and responsible way.

ARGUMENT

This brief supports respondents in three ways. In Section I, *amici* show that the Fleet Rules and similar state and local requirements imposed on purchasers of motor vehicles are fully consistent with the text, structure, and history of section 209 and the Act as a whole, as well as EPA's longstanding interpretation of the term "standard" in section 209. Section II.A describes innovative state and local initiatives designed to improve air quality that could be jeopardized by petitioners' reading of section 209(a). In Section II.B, *amici* discuss the adverse economic consequences of adopting petitioners' expansive reading of section 209(a).

I. SOUTH COAST'S FLEET RULES ARE NOT "STANDARDS" PREEMPTED BY SECTION 209(a).

A. The Text, Structure, and History of the Clean Air Act Show that the Fleet Rules Are Not "Standards."

The central legal issue in this case is whether the term "standard" as used in section 209(a) should be read broadly, as petitioners contend, to mean any requirement related in any way to the control of new motor vehicle emissions or, as the courts below held, more narrowly to refer only to numerical emission limits imposed on manufacturers.

The text of section 209 compels rejection of petitioners' broad reading. Section 209(b)(1)(C), for example, refers to "standards and accompanying enforcement procedures." 42 U.S.C. § 7543(b)(1)(C). Clearer still is section 209(e)(1), which preempts "any standard and other requirement" relating to the control of emissions from nonroad vehicles and engines such as trains and farm equipment. *Id.* § 7543(e)(1). Section 209(e)(2) likewise refers to "standards and other requirements" in the context of authorizing California to

adopt controls on nonroad vehicles. *Id.* § 7543(e)(2). Petitioners do not—and could not plausibly—argue that the term "standard" has a different meaning in these other subsections of section 209.

Section 209's express references to enforcement procedures and other requirements plainly would have been unnecessary if the term "standard" were broad enough to encompass any requirement relating to the control of emissions. In *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), the Court relied on similar textual distinctions between "standards" on the one hand, and "'techniques,' 'controls,' and 'technology'" on the other to interpret the word "standard" in section 112 of the Act to mean a quantitative limit. *Id.* at 286. Although Congress subsequently amended the Act to expand the scope of section 112, *Adamo Wrecking*'s interpretive principle still holds. Petitioners' reading of section 209 contravenes "the 'settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect.'" *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655, 1661 (2003) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

Other related provisions in Title II of the Act compel a reading of the term "standard" as referring exclusively to numerical emission limits imposed on manufacturers. Section 202 of the Act, which requires EPA to prescribe "standards" applicable to new motor vehicles, uses the term "standard" more than 100 times, each time either as an express numerical limit on manufacturers or in a manner consistent with that reading.[2] The same holds true for

[2] *E.g.*, 42 U.S.C. § 7521(a)(3)(B)(ii) (requiring standards for oxides of nitrogen from heavy-duty trucks that "provide that such emissions may not exceed 4.0 grams per brake horsepower hour"); *id.* § 7521(a)(6) (requiring standards for onboard vapor recovery systems with a "capture efficiency of 95 percent"); *id.* § 7521(b)(1)(A) (requiring standards providing that emissions for model years 1977 through 1979 "may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide"); *id.* § 7521(b)(1)(B) (requiring standards providing that emissions for model years 1977 through 1980 for oxides of nitrogen "may not exceed 2.0 grams per vehicle mile"); *id.* § 7521(g) & Table G (specifying numerical standards for certain light-duty trucks); *id.* § 7521(h) and Table H (same).

provisions that require standards for nonroad engines and vehicles, 42 U.S.C. § 7547(a), urban buses, *id.* § 7554, and clean fuel vehicles. *Id.* §§ 7583-7585.

Like section 209, section 202 plainly distinguishes standards from requirements, for example authorizing "requirements to control rebuilding practices [for heavy-duty engines], including standards applicable to emissions." *Id.* § 7521(a)(3)(D). In language that could not be clearer, Section 202(g)(1) requires "standards which provide that emissions from a percentage of each manufacturer's sales volume" meet specified numerical limits. *Id.* § 7521(g)(1). Petitioners fail to cite a single instance in which Title II of the Act clearly uses the term "standard" to refer to controls imposed on vehicle purchasers.

Also telling is section 246, which requires States to establish clean vehicle purchase requirements for centrally fueled fleets in areas designated as serious, severe, or extreme nonattainment areas. *Id.* § 7586. Throughout this lengthy provision, Congress repeatedly refers to fleet purchase programs not as "standards," but as "requirements." *E.g.*, *id.* § 7586(a)(3) (referring to the fleet program "requirements"); *id.* § 7586(b) and table (referring to a phase-in of the fleet program "requirements"); *id.* § 7586(c) (same); *id.* § 7586(d) (referring to the fleet program "requirements of this subsection"); *id.* § 7586(f)(2)(B) (same). The only use of the term "standard" in this provision comes in contexts that make clear that the referent is a numerical limit on emissions imposed on manufacturers. *See id.* § 7586(c) (referring to numerical emission standards issued under § 7583); *id.*

§§ 7586(f)(1)(B) & (C), (f)(4) (referring to numerical emissions for Ultra-Low Emission Vehicles and Zero Emission Vehicles); *accord* Clean Fuel Fleet Program, 58 Fed. Reg. 64,679, 64,679 (Dec. 9, 1993) (referring to fleet program "requirements" that mandate the purchase of vehicles that meet clean fuel vehicle emission "standards"). This clear textual distinction between "standards" and "requirements" in section 246's fleet purchase provisions undermines petitioners' reading of "standard" as including fleet purchase requirements and similar programs.

If the term "standard" embraced obligations imposed on purchasers such as the Fleet Rules, one would expect to find some reference to these purchaser obligations in Title II's enforcement sections and other provisions. In fact, Title II contains dozens of references to the obligations imposed on manufacturers and dealers (*e.g.* 42 U.S.C. §§ 7522 (prohibited acts), 7524 (civil penalties), 7525 (certification)), but does not contain a single reference to any obligation imposed on consumers or purchasers.

Given the Act's consistent use of "standard" in Title II to mean numerical emissions limits imposed on manufacturers, the Act plainly does not reflect the requisite "clear statement" or "clear and manifest purpose" needed to preempt the historic authority of state and local governments to improve air quality by imposing restrictions on purchasers. *Cf. City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) ("absent a clear statement to the contrary," an express preemption provision should be read to preserve traditional state and local prerogatives); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (federal statutes should not be read to preempt historic police powers of the States "unless that was the clear and manifest purpose of Congress").

The regulatory history of section 209 confirms the evidence found in the Act's text and structure regarding the

meaning of "standard." Although section 209 has been in effect for more than 30 years, and although EPA has statutory authority to issue rules implementing section 209(e) and other key provisions that use the term "standard" (*see, e.g.*, 42 U.S.C. §§ 7543(e)(2), 7521(a)(1)), petitioners fail to cite a single EPA regulatory decision or judicial ruling determining that the term "standard" as used in Title II applies to regulations directed at purchasers of motor vehicles rather than manufacturers or distributors.[3]

In fact, since the 1970s EPA has relied on the same textual distinctions set forth above to contend successfully that "standard" refers exclusively to quantitative or numerical limits imposed on vehicle manufacturers. For example, in *Motor & Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979), the D.C. Circuit adopted EPA's position that "the word 'standards' connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle." *Id.* at 1111. The court emphasized that in interpreting section 209, EPA "has consistently made a distinction between standards and accompanying enforcement procedures, confining the former to regulations on quantitative levels of emissions." *Id.* at 1113, 1114 n.38 (citing 43 Fed. Reg. 9344, 9345 (1978); 42 Fed. Reg. 3192, 3194 (1977); 36 Fed. Reg. 17,458 (1971)).

Just two years ago, EPA reiterated that "[a]n emission standard under 209(a) and (e) is a quantitative limit on emissions of a pollutant from an engine, vehicle or piece of

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[3] *Engine Mfrs. Ass'n v. Huston*, 190 F. Supp.2d 922 (W.D. Tex. 2001), *vacated as moot*, No. 01-50819 (5th Cir. Mar. 5, 2002), cited by certain industry *amici*, is not to the contrary because it involved preemption of nonroad vehicle regulation under section 209(e), which applies to "standards and other requirements." The *Huston* court distinguished section 209(e) from section 209(a) based on their different phraseology. *Id.* at 927.

equipment." Approval and Promulgation of Implementation Plans: Texas, 66 Fed. Reg. 57,223, 57,225 (Nov. 14, 2001). Moreover, EPA simultaneously confirmed that the term "standard" refers to limits imposed on manufacturers (not purchasers), adding that "[t]he means for achieving [a standard] are typically through modifying or changing the engine or equipment itself." *Id.*

This agency reading of "standard" as used in section 209(e) is especially significant because section 209(e)(2) requires EPA to issue regulations implementing this provision. The agency's interpretation of "standard" in section 209 thus deserves substantial deference. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

This recent reiteration of EPA's interpretation of "standard" came in the context of EPA's approval of revisions to the Texas State Implementation Plan, which included rules restricting the use of certain nonroad engines to certain times of the day and months of the year. *See* 66 Fed. Reg. at 57,223. Rejecting industry objections that section 209(e) preempts the Texas rules, EPA observed that it had previously issued rules under section 209(e) interpreting the term "standard" as referring solely to quantitative emission limits imposed on manufacturers. *Id.* at 57,225 (citing Air Pollution Control: Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36,969 (July 20, 1994) and Control of Air Pollution, 59 Fed. Reg. 31,306 (June 17, 1994)). EPA further noted that the D.C. Circuit had upheld the rules, including these interpretations, against industry challenge. *Id.* at 57,225 (citing *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996)).

EPA's longstanding interpretation of section 209 is entitled to substantial deference notwithstanding the *amicus* brief filed by the United States in this case, which argues for a broader reading. EPA is notably absent from that brief, which fails to account for the agency's consistent interpretation to the contrary. Where, as here, the Solicitor General's position conflicts with the expert agency's longstanding interpretation as expressed in congressionally authorized rulemakings, it is the agency's position that warrants deference, not counsel's position. *E.g., Mead Corp.*, 533 U.S. at 229; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (interpretations that "lack the force of law * * * do not warrant *Chevron*-style deference"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position." (citing authorities)).

If section 209(a) were read in isolation, there might be some ambiguity as to its precise meaning in light of the multiple dictionary definitions of the term "standard." Any such ambiguity would, of course, cut against petitioners, given the Court's presumption against preemption. But as shown above, the text, structure, and history of section 209 and related provisions confirm that the courts below properly interpreted that term. *Cf. Deal v. United States*, 508 U.S. 129, 131-32 (1993) (although words often have more than one dictionary meaning, "all but one of the meanings is ordinarily eliminated by context," due to the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

Petitioners argue (Br. 35) that even under a reading of "standard" as a numerical emissions limit, the Fleet Rules are standards because they refer to California's numerical limits. But section 209(a) does not preempt every law that in any

way makes reference to standards; it preempts only "standards." Because the Fleet Rules do not impose numerical emission limits or any other requirement on manufacturers, they are not standards preempted by section 209.

At times, petitioners seem to suggest (Br. 36-44) that other provisions of the Act might preempt the Fleet Rules. Congress does not, however, "hide elephants in mouseholes," changing the fundamental structure of a statutory scheme in ancillary provisions. *Whitman*, 531 U.S. at 468. Because the express preemption provision of section 209(a) does not apply to the Fleet Rules, the Court should not engage in tortured readings of other provisions to find preemption.

B. The Lower Courts' Distinction Between Manufacturer Controls and Purchaser Controls Is Reasonable and Comports with the Meaning of the Act.

In concluding that section 209(a) does not preempt the Fleet Rules, the lower courts distinguished controls imposed on purchasers from those imposed on manufacturers and distributors. Petitioners argue that this distinction is "illusory," "untenable," and "nonsensical," contending that purchases and sales are simply two sides of the same coin. Pet. Br. 19-20, 25-26.

More than 30 years ago, however, courts recognized that distinguishing between requirements imposed on manufacturers and those imposed on purchasers makes perfect sense when viewed in light of the language and purposes of section 209. As explained in *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972) (per curiam), "both the history and text of the Act show that the [preemption provision] was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every State and

locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars." *Id.* at 1124. The *Allway Taxi* court observed that local air quality protections imposed through controls on purchasers "cause only minimal interference with interstate commerce, since they would be directed primarily to intrastate activities and the burden of compliance would be on individual owners and not on manufacturers and distributors." *Id.*

Two decades later, the U.S. Court of Appeals for the District of Columbia Circuit expressly invoked the *Allway Taxi* distinction when it reviewed EPA's rules regarding the definition of "new" nonroad vehicles under the preemption provision set forth in section 209(e)(1). *Engine Mfrs.*, 88 F.3d at 1086. In rejecting an industry challenge to the rules, the court wrote: "The *Allway Taxi* interpretation, postponing state regulation so that the burden of compliance will not fall on the manufacturer, has prevented the definition of 'new motor vehicle' from 'nullifying' the motor vehicle preemption regime. [Industry] has offered no reason to suspect an essentially identical definition of 'new nonroad vehicle' will nullify the nonroad preemption scheme either." *Id.*

Distinguishing between producer and consumer controls also makes good economic sense. Requiring a manufacturer to ensure that a specified portion of its output meets a particular emission standard compels it to produce vehicles without any assurance that market demand will absorb them. Congress quite naturally was concerned with the economic inefficiency of requiring the production of motor vehicles that no one will buy.[4] In contrast, consumer controls like fleet

[4] *See* 42 U.S.C. § 7590(b) (banning federally imposed production mandates except for those under the California pilot test program); 136 Cong. Rec. H2576 (daily ed. May 21, 1990) (statement of Rep. Dingell) ("If we mandate production and mandate certain items, it does not guarantee that the product will be sold.").

purchasing requirements automatically create a market by compelling certain consumers to purchase the motor vehicles being produced, thereby avoiding the burden on industry of producing vehicles no one will buy. Indeed, by directing the States to adopt purchase mandates for private and public fleets in section 246, Congress sought to broaden market penetration of clean fuel vehicles without imposing a production mandate. *See* Clean Fuel Fleet Program, 63 Fed. Reg. 20,159, 20,160 (Apr. 23, 1998) ("Congress intended that the creation of a market for [clean fuel vehicles] would provide an incentive for vehicle manufacturers to produce and sell such vehicles outside California, ultimately resulting in broader market penetration.").[5]

Moreover, consumer controls often benefit the regulated community (*e.g.*, the purchasing fleets) by creating economies of scale that would not otherwise exist. The cost of operating low-emitting, clean fuel vehicles might well be less than the cost of operating conventional vehicles due to reduced fuel costs and the like,[6] but without purchase

[5] *Accord* 42 U.S.C. §§ 13,251, 13,257 (requiring the Secretary of Energy to adopt purchase mandates); 138 Cong. Rec. H11,425 (daily ed. Oct. 5, 1992) (statement of Rep. Bruce) ("This bill would create a market for these fuels by requiring Federal, state and some private fleets to buy increasing levels of alternatively fueled vehicles."); 138 Cong. Rec. H11,439 (daily ed. Oct. 5. 1992) (statement of Rep. Slattery) ("[Demand-side management] programs can not only serve to promote energy efficiency, but can also create and expand markets for new and improved energy equipment, products, and services.").

[6] *See* Emission Standards for Clean-Fuel Vehicles and Engines, 59 Fed. Reg. 50,042, 50,069 (Sept. 30, 1994) (predicting lower operational costs for most light-duty clean fuel vehicles as compared to conventional fuel vehicles); Charles Haddad & Christine Tierney, *FedEx and Brown Are Going Green*, BUS. WK. ONLINE, Aug. 11, 2003, *at* http://www.businessweek.com/magazine/content/03_32/b3845086.htm (reporting that large delivery fleets are switching to hybrids and other clean trucks because they are cheaper to maintain and operate, with fuel cost savings of up to 50 percent).

requirements, retail prices could be prohibitive because so few are produced. And manufacturers might be unwilling to produce and market cleaner vehicles due to the uncertainty of demand. Consumer controls such as fleet purchase requirements create a guaranteed market, drive down production costs through economies of scale, and lead to lower purchase prices for the regulated community. When those reduced purchase costs are combined with lower operational costs, the fleets might well have lower overall costs than they would have in the absence of regulation.[7]

The Fleet Rules at issue combine the best of both worlds. They create market demand for cleaner vehicles, but they simultaneously exempt fleets from compliance where the market fails to provide a sufficient supply of complying vehicles. Thus, neither manufacturers nor purchasers are put at significant risk.

Purchase mandates have an additional advantage over production mandates because the former allow those producers best able to make cleaner vehicles to produce and sell them, as opposed to requiring every manufacturer to do so. In other words, demand-side controls allow the market to sort out which producers can most efficiently produce cleaner vehicles. They do not disrupt any particular manufacturer's production schedule because no manufacturer is required to

[7] *See* Alternative Fuel Transportation Program, 61 Fed. Reg. 10,622, 10,649 (March 14, 1996) (purchase mandate programs create economies of scale that result in decreasing incremental costs); 138 Cong. Rec. H3808 (daily ed. May 27, 1992) (statement of Rep. Synar) ("[I]ncreased Federal and private purchases of [alternative fuel vehicles] mandated in the bill[] will help create the market necessary to encourage vehicle manufacturers to produce these vehicles and allow economies of scale which will reduce production costs."); Nathanael Greene & Vanessa Ward, *Getting the Sticker Price Right: Incentives For Cleaner, More Efficient Vehicles*, 12 PACE ENVTL. L. REV. 91, 94 (1994) (demand-side regulation can make "cleaner, more efficient vehicles more affordable to buy, and * * * more profitable to sell").

sell any vehicles to the covered purchasers. Only those producers who want to tap this market will do so, and the market will adjust the price accordingly.

The distinction between producer and consumer regulation relied on by the courts below is fully consistent with the two cases upon which petitioners rely most heavily: *American Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998), and *Association of Int'l Auto. Mfrs. v. Commissioner*, 208 F.3d 1 (1st Cir. 2000) (*AIAM*). In both cases, the courts concluded that Zero Emission Vehicle (ZEV) mandates imposed on manufacturers are standards. In fact, in *AIAM* the matter was undisputed. *Id.* at 6 (all parties "agree that the ZEV mandates are standards"). Although petitioners and industry *amici* extract snippets from these opinions in an attempt to bolster their position, neither court had occasion to consider whether purchase mandates imposed on consumers constitute pre-empted standards. As shown above, they do not.

In short, respondents' interpretation of "standard" as meaning numerical emission limits imposed on manufacturers yields a symmetrical, harmonious set of provisions. Under this reading, EPA establishes numerical emission limits and associated testing procedures as required by section 202, California may adopt its own numerical emission standards under section 209(b), and other jurisdictions may adopt California's standards under section 177 (*see* 42 U.S.C. § 7507). And no State or municipality can require a manufacturer to build a "third vehicle." *See id.*

In contrast, petitioners have failed to provide a coherent, unified reading of the Act. For instance, if South Coast's Fleet Rules are "standards" preempted by section 209, one might expect section 202, which authorizes EPA to issue vehicle emission standards, to empower EPA to impose a national fleet purchase program at the federal level (*i.e.*, a federally imposed purchase mandate on private fleet operators, as distinguished from the state-imposed fleet programs

required for specified areas by section 246). Yet there is no evidence that Congress intended EPA to impose nationwide purchase mandates or that EPA has ever considered doing so. And petitioners presumably would oppose any such effort. The reason, of course, is that the term "standard" as used in section 202 has always been understood to refer to quantitative emission limits imposed on manufacturers.

II. ADOPTION OF PETITIONERS' BROAD READING OF SECTION 209(a) WOULD ERODE ENVIRONMENTAL FEDERALISM AND JEOPARDIZE VITAL STATE AND LOCAL GOVERNMENT INTERESTS.

In recent years, a host of scholars and commentators have hailed the emerging role of state and local governments in the cooperative federalism that drives our nation's efforts to protect public health and the environment. State and local solutions to contemporary environmental problems are especially appropriate to address "diffuse, diverse, and very local causes" of pollution such as motor vehicles. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 413 (2002) (recognizing that "[l]ocal responses are inherently flexible and context-specific," thereby enabling local governments "to become useful partners in the state and federal environmental protection systems"); *see also* David L. Markell, *States As Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 355-57 (1994) (noting the role of state and local governments as central actors in environmental regulation); Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199 (1997) (observing that opinion polls indicate that the public wants both the federal government and the States to protect the environment, according a preference to neither).

South Coast's Fleet Rules and similar state and local laws that create demand for environmentally sound technologies are not preempted "standards." Rather, they are precisely the kind of "economic experiment" Congress expects the "laboratories" in our federal scheme to implement. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

As shown below, petitioners' overly expansive reading of section 209(a) would not only undercut cooperative federalism in environmental protection by jeopardizing innovative state and local environmental initiatives, but also impose substantial economic costs as state and local officials endeavor to meet federal air quality standards.

A. Petitioners' Position Would Threaten Many State and Local Laws That Protect Public Health and the Environment.

Petitioners assert that section 209(a) preempts any state or local law that refers to emissions or engine design criteria related to emissions (Pet. Br. 26), or is "linked" in any other manner to vehicle emissions (*id.* 28). This reading, however, would threaten many laws currently on the books. For example, the Commonwealth of Virginia requires drivers in "HOV" lanes to use either a "high occupancy vehicle" or a low emission vehicle. VA. CODE ANN. §§ 33.1-46.2(6) and 46.2-749.3. These requirements apply during rush hour to major commuter routes in northern Virginia, such as Interstates 66, 95, and 395, and they constitute one of the most successful HOV programs in the country.[8] Virginia's inclusion of low emission vehicles in the program plainly is designed to reduce emissions from new cars by providing an

[8] *See* THE HIGH-OCCUPANCY VEHICLE ENFORCEMENT TASK FORCE, FINAL REPORT (2003), *at* http://www.virginiadot.org/infoservice/resources/FINALHOVTaskForceReport8-15-03.pdf.

incentive to purchase clean vehicles such as the Toyota Prius or Honda Insight.[9] Several other States have similar laws that include low emission vehicles in their HOV programs.[10] Petitioners' reading of section 209(a) as precluding any state or local regulation tied to emission characteristics could invalidate these and other successful incentive programs.[11]

Petitioners' position also could jeopardize state laws that provide tax credits as an incentive to purchase low emission vehicles and alternative fuel vehicles.[12] Respondents' briefs

[9] *Id.* at 4.

[10] *E.g.*, COLO. REV. STAT. § 42-4-1012(2.5); FLA. STAT. § 316.0741(4); GA. CODE. ANN. §§ 32-9-4(a)(4), 40-2-76; UTAH CODE ANN. §§ 41-6-53.5(4)(a)(iii), 41-6-53.5(5). Although federal law requires similar exemptions for certain low emission vehicles as a condition for federal funding (23 U.S.C. § 102(a)(2)), these state laws go beyond those requirements by including low emission vehicles in HOV programs on roads that do not depend on federal funding.

[11] Under petitioners' reading of the Act, inclusion of low emission vehicles in HOV programs would not be rescued from preemption by section 209(d), which preserves for States "the right otherwise to control" the use of motor vehicles. 42 U.S.C. § 7543(d). Because the word "otherwise" retains preemption of all standards, and because petitioners read "standard" as including any state or local law that makes reference to emission limits, their reading would threaten the inclusion of low emission vehicles in HOV programs notwithstanding section 209(d).

Section 249(f)(3) creates a further tension in petitioners' position by authorizing clean fuel vehicle incentives, including HOV exemptions, for States that opt into the California pilot program for clean fuel vehicles. 42 U.S.C. § 7589(f)(3). Consistent with the text and structure of Title II, nowhere does section 249(f)(3) refer to these state incentive laws as "standards." The Solicitor General advises that no State has opted in (U.S. Br. *Am. Cur.* 6 n.2), but the provision still is irreconcilable with petitioners' position that section 209(a) preempts every state law that refers to new vehicle emissions.

[12] *E.g.*, ARIZ. REV. STAT. § 43-1174; ARK. CODE ANN. § 15-4-2104; COLO. REV. STAT. § 39-22-516(2.5); CONN. GEN. STAT. § 12-217i; GA. CODE ANN. § 48-7-40.16(b); LA. REV. STAT. ANN. § 47:38; MD. CODE ANN., TRANSP. § 13-815; MICH. COMP. LAWS § 211.9i; OKLA. STAT. tit.

discuss other incentive programs that also would be threatened by petitioners' reading of section 209(a).

Unlike petitioners, the Solicitor General (U.S. Br. *Am. Cur.* 17 n.4) recognizes that section 209(a) does not apply to at least some incentive programs. *Amici* agree that section 209(a) has no application to incentive programs, and that petitioners' reading of "standard" as including any law that refers to emission limits is patently overbroad. The Solicitor General's position, however, inexplicably turns on whether incentive programs create "barriers to market entry" (*id.*), a reading that finds no support in the language of section 209(a). In contrast, respondents' reading preserves the legitimacy of incentive programs while adhering to the text of section 209 and the Act as a whole.

Petitioners' unduly broad reading of "standard" as any requirement that makes reference to vehicle emissions also might prevent States and local governments from enacting laws governing their own vehicle purchasing decisions, or requiring their agencies and subdivisions to purchase cleaner vehicles. For example, just last year the State of New Mexico enacted a law that requires 75 percent of state government and educational agency motor vehicle purchases to be low emission vehicles. *See* N.M. STAT. ANN. § 13-1B-3. West Virginia imposes alternative fuel fleet purchase requirements on its political subdivisions ranging from 50 to 75 percent, *see* W. VA. CODE § 8-27A-2(b) & (c), and it imposes similar requirements on state agencies. *See id.* § 5A-2A-2(d) & (e). Missouri requires state agencies to ensure that at least 50 percent of agency fleet vehicles can use alternative fuels. *See* MO. ANN. STAT. § 414.410. Many other States have similar laws that could be jeopardized under

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68, § 2357.22, amended by 2003 OKLA. SESS. LAWS Ch. 186; OR. REV. STAT §§ 315.354, 315.356, 316.116, 469.160-.180, 469.185-.225; VA. CODE. ANN. § 58.1-438.1.

petitioners' proposed reading of section 209(a) because they require state agencies and political subdivisions to purchase low emission vehicles.[13] Similar laws at the municipal level also could be called into question.[14]

In contrast to petitioners, the Solicitor General acknowledges that "the State of California may be entitled to place restrictions on the types of new public vehicles that the State and its instrumentalities purchase for their own use." U.S. Br. *Am. Cur.* 29 (quoting *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 231-32 (1993)); *see also Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). But state and local officials also need the flexibility to impose purchasing controls on private fleets to protect public health and comply with federal law. For instance, the cities of Dallas and Fort Worth are formulating requirements that taxi, limousine, and other fleets operate ultra-low emission vehicles to help meet federal air quality standards by 2007. *See Focus on our Partners*, MOBILITY MATTERS (N. Cent. Texas Council of Gov'ts' Reg. Transp. Council), Fall 2002, at 2, *at* http://www.dfwinfo.com/trans/mobility_matters/mm_fall02.pdf. The City of Dallas advises that it is also considering requirements and bid preferences for city contractors that would reduce emissions by increasing the purchase and use of cleaner vehicles and fuels. These important clean air initiatives might well be preempted by petitioners' broad reading of section 209(a).

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[13] *E.g.*, ARIZ. REV. STAT. § 15-349; IOWA CODE §§ 260C.19A; 262.25A, amended by 2003 Iowa Legis. Serv. 145 (West); KAN. STAT. ANN. § 75-4616(b)(5); LA. REV. STAT. ANN. §§ 33:1418, 39:364; MASS. REGS. CODE tit. 310, § 7.45; MINN. STAT. § 16C.135; NEV. REV. STAT. §§ 486A.010-.180; N.Y. EXEC. LAW § 201-a; OHIO REV. CODE ANN. § 123.011(F); OR. REV. STAT. §§ 267.030, 267.517, amended by 2003 Or. Laws 186; WASH. REV. CODE § 43.19.637.

[14] *E.g.*, SAN FRANCISCO ENV'T CODE § 406.

B. Petitioners' Position Would Impose Substantial Economic Burdens on State and Local Economies.

The briefs of respondents and other *amici* discuss the premature mortality, cancer risks, permanent lung damage, and other grave health impacts caused by air pollution. But in addition to these serious public health issues, air pollution causes severe economic losses. EPA estimates that smog and other air pollution is responsible for several billion dollars worth of crop damage each year. *See* Final Rule on Ozone Transport Commission, 60 Fed. Reg. 4712, 4713 (Jan. 24, 1995). The repair and cleaning of buildings and painted surfaces damaged by air pollution costs tens of millions of dollars each year. *See* Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 68 Fed. Reg. 28,328, 28,351 (May 23, 2003). Decreased visibility from haze degrades the natural beauty of national parks, wilderness areas, and local communities, thereby reducing tourism and economic growth. *Id.* at 28,349-51. Air pollution harms our nation's fisheries and tourism industry by contributing to fish kills from low dissolved oxygen and toxic blooms. *Id.* at 28,352. Without the flexibility needed to reduce motor vehicle emissions through innovative measures such as the Fleet Rules, state and local economies will continue to bear these and other substantial costs.

Just as important, petitioners' position would further harm beleaguered state and local economies by shifting more of the compliance burden to small businesses and other stationary sources of air pollution. In 1997 EPA revised the federal air quality standards for ozone and soot. *See Whitman*, 531 U.S. at 463. Data for 1999-2001 show that 111 million people live in areas in non-compliance with the ozone standard, and at least 65 million people live in areas in non-compliance with of the soot standard. *See* 68 Fed. Reg. at 28,334. Unless state

and local officials implement new control strategies such as the Fleet Rules, tens of millions will continue to live in non-attainment areas decades from now. *Id.* at 28,334-35.

Motor vehicles are the largest source of air pollution in the country. *See* Henry A. Waxman, *et al.*, *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1947, 1950 (1991). For smog's precursors—oxides of nitrogen and volatile organic compounds (VOCs)—cars and light trucks are projected to account for nearly 40 percent in some cities and 20 percent nationwide. *See* Control of Air Pollution from New Motor Vehicles, 64 Fed. Reg. 26,004, 26,009 (May 13, 1999). In the South Coast Air Basin, on-road motor vehicles contribute more than half of these pollutants. J.A. 80. Even industry sources acknowledge that state and local government air quality officials must devise innovative programs to control pollution and protect public health and the environment. *See, e.g.*, Gary Polakovic, *Smog Woes Back on Horizon*, L.A. TIMES, July 15, 2003, at A1 (quoting an industry representative as saying: "We're running out of time. It's time for the agencies to start thinking outside the box. We need to be more creative and use a different toolbox.").

If section 209(a) were read broadly to preclude state and local governments from implementing creative programs to promote the use of clean vehicles and otherwise reduce vehicle emissions, far more of the compliance burden would fall on small businesses and other stationary sources, with profound economic and social consequences.[15] A small dry cleaner or manufacturing plant, for example, might be forced

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[15] Christopher M. Grengs, *Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform*, 85 MINN. L. REV. 1957, 1975 & n.128 (2001) (discussing the economic impact of the Clean Air Act on small businesses).

to reduce its hours of operation, or shut down altogether.[16] Moreover, businesses are prohibited from locating or expanding in nonattainment areas unless new emissions are offset by reductions elsewhere. *See, e.g.*, 42 U.S.C. §§ 7511a(a)(4), (b)(5), (c)(10), (d)(2), (e)(1). New businesses might bypass nonattainment areas in favor of locating in attainment areas. Whole communities thus could be rendered off-limits for new development, stunting growth and impairing quality of life for residents. If a State fails to implement measures required in nonattainment areas, the costs could be even greater because the Act requires EPA to cut off federal highway funds or impose additional emission offset requirements. 42 U.S.C. § 7509. One analyst estimates that $80 billion in hidden costs could result from non-compliance with federal ozone standards. *See* Susan E. Dudley, *Economic Impact Analyses*, 16 PACE ENVTL. L. REV. 81, 83-84 (1998).

Rural areas have an especially pressing need to control emissions from motor vehicles because emissions from surrounding forests and other vegetation account for a substantial portion of VOC emissions that cannot feasibly be reduced. 64 Fed. Reg. at 26,014. To meet EPA's new ozone standards, these regions must focus largely on smog's other precursor, emissions of oxides of nitrogen, which are produced by high-temperature combustion processes such as those in automobiles. *Id.* These concerns are particularly great in the rural areas of the Southeast, where VOC emissions from vegetation are an important contributor to smog.[17]

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[16] Patricia Ross McCubbin, Michigan v. EPA: *Interstate Ozone Pollution and EPA's "NOx Sip Call,"* 20 ST. LOUIS U. PUB. L. REV. 47, 61-62 (2001) (describing how state implementation plans must make tradeoffs between sources such as motor vehicles and dry cleaners).

[17] *See* U.S. Congress, Office of Technology Assessment, CATCHING OUR BREATH: NEXT STEPS FOR REDUCING URBAN OZONE 4, 98, 101 (1989), *at* http://www.wws.princeton.edu/~ota/disk1/1989/8906_n.html (areas where VOC contributions from vegetation exceed 25% are almost exclusively in the Southeast).

Petitioners display no awareness of, or concern for, the profound economic consequences for state and local governments of their position. Affirmance of the judgment below will promote Congress's intent to ensure that state and local officials have the means necessary to meet the new federal air quality standards in an economically responsible way.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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